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No. 03-1457

Supreme Court, U.S.
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In The
# Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY,

*Petitioner,*

v.

CRESCENT WHARF & WAREHOUSE COMPANY, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

In accordance with Rules 14.1 and 29.6 of this Court, State Compensation Insurance Fund, Pasha Maritime Services and Marine Terminals Corporation reports that they have no parent companies and no subsidiaries that are not wholly owned.

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## INTRODUCTION

COMES NOW Respondents State Compensation Insurance Fund, (hereinafter referred to as 'SCIF') as carrier for Pasha Maritime Services and Marine Terminals Corporation and respectfully opposes the Petition for Writ of Certiorari filed by Petitioner. As no liability has ever been found by any adjudicator or reviewing court to rest with SCIF, Pasha Maritime Services or Marine Terminals Corporation, we would like to use this brief as a means of discussing the public policy issues inherent in this appeal rather than focusing on the purely legal discussions of the two major parties.

## STATEMENT OF THE CASE

Petitioner Metropolitan Stevedore Company's procedural history of this matter as printed in their "Statement of the Case" in their Petition for a Writ of Certiorari at pages 3-6 is accurate and SCIF hereby adopts it as our own.

## REASONS FOR DENYING THE WRIT

### (1) The Ninth Circuit Has Given Us A Bright Line Test To Determine Liability In Multiple Party Cumulative Trauma Cases

The Ninth Circuit Court of Appeals in this matter has given us a bright line test to determine liability in multiple party cumulative trauma cases. This is done by defining the last responsible employer as the employer upon the date of the final physical injury, rather than the start of

diminished earning capacity. This is a far better test to determine liability as doctors will be able to state when the last bit of mechanical injury took place rather than a lengthy finger pointing fight between carriers as to the much harder to determine onset of economic harm. In the latter situation numerous factors need to be considered. Questions will be asked such as: When did the need for surgery arise? On what date did the decision to have surgery occur? When was it scheduled? Is the economic harm from the moment of the surgery or after rehabilitative therapy and recuperation? Each of these factors might occur under a different employer and carrier. No carrier will willingly step up to the plate to accept costly liability when there is a chance to roll it onto a prior or subsequent employer and carrier.

By defining liability by the last date of physical injury, years of litigation can be avoided. The questions will be: (1) For whom did the Claimant last work prior to having surgery or going off work? (2) Did even the slightest, microscopic physical harm occur medically during that work session?

If the answer to question number 2 is "yes" liability will be determined.

If the answer to question number 2 is "no" the parties will look at each preceding employer until the answer is "yes." Literally years of litigation will be avoided if the parties act in good faith. One would hope that the last responsible employer would then accept liability promptly and voluntarily and authorize the needed treatment and Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-33 (hereinafter "LHWCA") benefits, in keeping with the language quoted by Petitioner from the dissent in *Estate*

*of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (at pp. 485, 490-91).

If a dispute should still exist, the U.S. Department of Labor would be able to quickly make a recommendation at the Informal Conference level based on the medical reports and final work history to pinpoint liability. If the targeted carrier objects, the Office of Administrative Law Judges will be able to decide the issue with much less litigation than will be required under the tests proposed by Petitioner. It will all boil down to what the doctors say about when the last physical harm took place and the printout of work history for that day.

### (2) There Is A Pool Of Insurance Carriers Who Are Better Able To Bear The Financial Burden Than The Injured Workers

The final result of applying the "last physical harm" test, as in this case, may seem very harsh for the targeted carrier and employer if the injured worker only was employed for a very short while when the last little bit of physical harm occurred. This though is a risk shared by all carriers who choose to participate in this market.

The pool of insurance carriers who write coverage for claims brought under the LHWCA are able to protect their business interests by determining sufficient premium to charge their insured employers to be able to bear these occasional financial hardships. Because there exists a pool of carriers, the carrier who gets tagged seemingly unfairly in one instance, will benefit in the next case where someone else is held liable. Ultimately it all works out.

Contrast this with the immense difficulty imposed on the injured worker who may be forced to go without medical treatment and benefits while multiple carriers point fingers at each other and endlessly litigate the last responsible employer determination over a course of many months or years. As a practitioner in this field for over a decade, the undersigned personally has seen cases where injured workers have lost their homes and suffered economic ruin and physical worsening while carriers fight with each other over liability. The carriers can far better shoulder the burden as a cost of doing business in the LHWCA insurance market.

### (3) Under The Ninth Circuit's Bright Line Test It Will Be Easier To Determine Liability Without Litigation And Will Promote Settlements

It is critical in multiple party cumulative trauma cases that the parties are able to objectively look at the facts and determine where liability will ultimately fall. It is precisely this predictability that allows cases to be settled without lengthy litigation. This predictability of what will result should the matter be litigated will allow practitioners in this field to know when to "bite the bullet" and contribute heavily to a settlement even where the onset of harm may have occurred first with an earlier employer but where the ongoing harm and continuing need for treatment continues through the last day worked.

## CONCLUSION

The fundamental purpose of the LHWCA is to promptly get treatment and benefits to the injured worker. The Ninth Circuit's bright line test in multiple party cumulative trauma cases will accomplish that goal with far less litigation than what is being proposed by the Petitioner. Therefore the undersigned requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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